



U.S. Citizenship
and Immigration
Services

B4

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 25 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

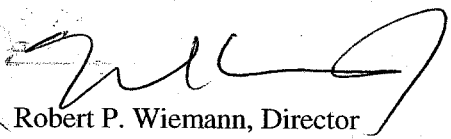
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The director initially approved the employment-based preference visa petition. Subsequently, the beneficiary applied for adjustment of status. Based, in part, upon an investigation conducted by a Citizenship and Immigration Services (CIS) official in Beijing, China, the director concluded that an error was made in approving the petition. The director, therefore, properly served the petitioner with a Notice of Intent to Revoke, and he ultimately revoked the petition's approval on February 17, 2004. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition's approval will be revoked.

The petitioner is a California corporation that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director revoked his approval of the petition concluding that: (1) the petitioner had not been doing business for at least one year at the time of filing the petition; (2) no qualifying relationship exists between the petitioner and the claimed foreign entity; and (3) the proffered position in the United States is not in an executive or managerial capacity.

On appeal, counsel submits a brief and additional evidence.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of the former [REDACTED], which is now [REDACTED]; (2) imports and exports chemical materials and other products; and (3) employs four persons, including the beneficiary who is occupying the proffered position as

an intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a weekly salary of \$692.30.

The regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." A Notice of Intent to Revoke is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Esteime*, 19 I&N Dec. 450 (BIA 1987). Notwithstanding Citizenship and Immigration Service's (CIS) burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The first issue to be discussed in this proceeding is whether the petitioner had been doing business for at least one year at the time it filed the I-140 petition. 8 C.F.R. § 204.5(j)(3)(i)(D). The term *doing business* is defined as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." 8 C.F.R. § 204.5(j)(2).

The petitioner filed the I-140 petition on March 24, 1997. In the Notice of Intent to Revoke (NOIR), the director informed the petitioner that in an October 22, 2002 interview at the Los Angeles district office, the beneficiary stated that the petitioner does not sell products in the United States. According to the director, the beneficiary also stated that the petitioner has never imported products from China to the United States, as the products are shipped directly to Canada where the petitioner sells its products. The director noted that the petitioner submitted five invoices, which showed that the petitioner purchased products in California and shipped them to itself. The director stated that there is no evidence that the petitioner is exporting or importing products as claimed on the I-140 petition.

In the NOIR, the director asked the petitioner to submit documentary evidence to show that it had been doing and continues to do business. This evidence included, but was not limited to, copies of major sales invoices and customs forms. In response, counsel stated that the petitioner "has entered into agreements with international companies binding it to sell and export products out of the United States and into the relevant countries." Counsel submitted two sales agreements to support his assertions.

When revoking his approval of the petition, in part, because the petitioner had not been doing business, the director noted that the petitioner failed to submit any of the requested documentation that the NOIR specified, or an explanation for why such evidence could not be presented.

Counsel's appellate response is identical to his response to the NOIR. It contains the exact same statements and presents the same evidence. Absent new evidence, the petitioner has not met its burden of proving that the director's conclusions were erroneous. More importantly, however, the petitioner failed to submit the specific items of evidence requested by the director in the NOIR. Failure to submit requested evidence that

precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Accordingly, the petitioner has failed to show that it had been engaged in the regular, systematic, and continuous provision of goods and/or services for at least one year at the time it filed the petition.

The second issue to be discussed is whether a qualifying relationship exists between the petitioner and the foreign entity, the former [REDACTED] which is [REDACTED]. Pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C), a petitioner must establish that it and the foreign entity share a qualifying relationship.

In the NOIR, the director informed the petitioner that the evidence was deficient regarding its relationship with a qualifying foreign entity. According to the director, stock certificate number one showed that China [REDACTED] purchased 500,000 shares of stock on June 28, 1993; however, the stock ledger showed that stock certificate number one was issued on June 1, 1995 for only 50,000 shares at \$50,000. In addition, the director informed the petitioner that, pursuant to a field investigation in December 2000, the investigator found that the foreign entity had moved and left no forwarding address. The director asked the petitioner to explain the discrepancies and requested specific documentation, including proof that China Xinghua Group actually purchased the shares of stock.

In response, counsel stated that in 1999, [REDACTED] purchased [REDACTED]. Counsel submitted the purchase agreement and provided [REDACTED] address and telephone number.

In the revocation notice, the director stated that the record contained no evidence that China Xinghua Group paid for the shares of stock, and that the petitioner failed to explain the discrepancies in the evidence.

On appeal, counsel presents no new evidence; he simply repeats assertions made in response to the director's NOIR and submits copies of documentary evidence already included in the record.

The regulations at 8 C.F.R. § 204.5(j)(2) define a subsidiary, in pertinent part, as a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, half of the entity and controls the entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact

number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In the present matter, the petitioner fails to address the director's comments in both the NOIR and the notice of revocation. It fails to submit the documentary evidence that the director requested to establish that the foreign entity actually owns and controls the petitioner. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Accordingly, the petitioner has failed to show that it shares a qualifying relationship with a foreign entity.

The third issue to be discussed in this proceeding is whether the beneficiary's job with the petitioner is in a managerial or executive capacity. The AAO notes that the petitioner and counsel claim that the beneficiary's job is executive, not managerial. Therefore, the AAO will address only this ground.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the NOIR, the director informed the petitioner that it failed to provide an organizational chart and job descriptions for its employees when it filed the petition in 1997. The director stated that, without such evidence, he could not determine whether the proffered position was in a managerial or executive capacity. The director, therefore, requested specific evidence including, but not limited to, an organizational chart for the petitioner that described the company's staffing level in March 1997, and the DE-6 forms for the quarter in which the petition was filed.

The petitioner failed to submit the requested organizational chart and DE-6 forms. Instead, counsel explained the petitioner's current staffing level, which includes "three top executives." Counsel claimed that the proffered position is in an executive capacity.

In the revocation notice, the director noted that the petitioner declined to submit the requested organizational chart and DE-6 forms. The director noted further that the description of the beneficiary's job was too vague to convey any true understanding of his position.

On appeal, counsel states that the beneficiary is an executive and that he devotes 100 percent of his time to performing executive duties. Counsel states that the beneficiary is responsible for negotiations and mergers, and that only a person in a high-level position would have such authority. Counsel resubmits evidence that he had introduced into the record when responding to the NOIR.

The evidence in the record fails to establish that the proffered position is in an executive capacity. Once again, the petitioner failed to submit critical evidence when requested by the director. The organizational chart and the DE-6 forms for the March 1997 period would have established the petitioner's staffing level and the company's organizational structure as of the filing date of the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's evidence concerning its new staffing level, which includes three alleged "top executives" is irrelevant, as this is not the staff that was in place when the petition was filed. As stated earlier, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Accordingly, the petitioner has not established that the position offered to the beneficiary is in an executive or managerial capacity.

There is "good and sufficient cause" within the meaning of section 205 of the Act to revoke the approval of a visa petition if the evidence of record at the time of the decision warrants a denial based on the petitioner's failure to meet his or her burden of proof. *Matter of Esteime, supra*. Based upon the above discussion, the petitioner has not demonstrated that at the time of filing the petition in 1997: (1) the petitioner had been doing business; (2) it had a qualifying relationship with a foreign entity; and (3) the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to revoke approval of the petition shall not be disturbed.

Beyond the decision of the director, because the petitioner failed to establish that it shares a common relationship with the beneficiary's foreign employer, the beneficiary cannot meet the requirements of the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B). This regulation states that the beneficiary must have been employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status. Although the director did not raise this issue in the NOIR or the revocation notice, it is, nevertheless, an additional reason why the approval of the petition must be revoked.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The approval of the petition is revoked.